

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Criminal No. 13-0055 (JRT);

Civil No. 20-0181 (JRT)

Plaintiff,

v.

ORDER

MARCELINO GARCIA,

Defendant.

Marcelino Garcia, Reg. No. 16871-041, FCI - Moshannon Valley, 555 Geo Drive, Philipsburg, PA 16866, pro se.

Julie E. Allyn, Assistant United States Attorney, **UNITED STATES ATTORNEY'S OFFICE**, 600 United States Courthouse, 300 South Fourth Street, Minneapolis MN 55415.

Defendant Marcelino Garcia pleaded guilty to one count of distribution of methamphetamine in violation of 21 U.S.C. § 841. In 2014, Garcia attacked the validity of his sentence through a motion brought pursuant to 28 U.S.C. § 2255, *see* ECF No. 61; the motion was eventually denied on the merits, *see* ECF No. 74. Garcia now returns to this Court again seeking relief from his sentence pursuant to § 2255. The Court lacks jurisdiction over Garcia's § 2255 motion and will therefore grant the government's motion to dismiss [ECF No. 88].¹

Under 28 U.S.C. § 2255(h), "[a] second or successive motion [under § 2255] must be certified . . . by a panel of the appropriate court of appeals" before that § 2255

¹ Garcia was afforded an opportunity to respond to the motion to dismiss, *see* ECF No. 90, but has not done so.

motion may be considered by the district court. Garcia has not sought, much less received, authorization from the United States Court of Appeals for the Eighth Circuit to pursue relief under § 2255 for a second time. Furthermore, although “not every § 2255 motion filed second in time” is second or successive within the meaning of § 2255(h), *see United States v. Sellner*, 773 F.3d 927, 930 (8th Cir. 2014), Garcia’s pending § 2255 motion is, in fact, successive. Garcia’s first § 2255 motion was denied on the merits, and the factual predicates of the claims raised in the pending § 2255 motion were known to Garcia at the time that the first § 2255 motion was filed. *See In re Coley*, 871 F.3d 455, 457-58 (6th Cir. 2017); *cf. Forrest v. United States*, 934 F.3d 775 (8th Cir. 2019) (recognizing second-in-time § 2255 motion raising claims pursuant to case law not available to petitioner at time of first § 2255 motion to be successive within meaning of § 2255(h)(2)).

This Court cannot consider the merits of Garcia’s pending § 2255 motion unless and until he receives authorization from the Eighth Circuit to proceed with that motion. Accordingly, the government’s motion to dismiss will be granted and the motion will be denied without prejudice for lack of jurisdiction. No certificate of appealability will be issued. *See* 28 U.S.C. § 2253(c).

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT:**

1. The motion to dismiss of defendant United States of America [ECF No. 88] is **GRANTED**.
 2. The motion to vacate, set aside, or correct sentence of defendant Marcelino Garcia [ECF No. 86] is **DENIED WITHOUT PREJUDICE**.
 3. No certificate of appealability is issued.
- LET JUDGMENT BE ENTERED ACCORDINGLY.**

DATED: June 18, 2020
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
Chief Judge
United States District Court